The only way for the Commission to avoid the creation of such excessive, and otherwise perverse, incentives (and to elude the other problems noted above), is to maintain its traditional ad hoc accounting and ratemaking approach under which all settlement costs and other litigation-related expenses are presumptively allowable. This time-tested approach does not skew carrier incentives one way or the other and thus ensures that a carrier's decision to incur costs will properly be based on a calculated business judgment rather than on a mere desire to avoid a presumption of disallowance.

C. The Notice's Proposed Approach With Respect to Antitrust Litigation Expenses is Unworkable and Inappropriate From a Legal and a Public Policy Perspective

In its earlier Litigation Costs Order, the Commission decided that litigation expenses were to be accounted for in operating accounts but were to be subject to recapture upon an adverse judgment or post-judgment settlement.

As discussed in section I.A., supra, the Litton Accounting Appeal rejected this approach on both legal and policy grounds. Central to the court's criticism was: 1) the Commission's failure to present a reasoned analysis for its radical departure from longstanding precedent; and 2) the practical difficulties engendered by the Commission's establishment of the "success" or "failure" of the litigation as the sole determinant of the accounting and ratemaking treatment of litigation expenses.[46]

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[46] Litton Accounting Appeal, 939 F.2d at 1029-34.

The Litigation Costs Decision also criticized the Commission's proposed treatment of litigation expenses by pointing out that the Commission had failed adequately to explain why its recapture policy did not constitute retroactive ratemaking.[47] In response to this criticism, the Notice proposes a new approach which would have litigation expenses accrue in a balance sheet deferral account until the case is resolved. Upon entry of an adverse, nonappealable final judgment or post-judgment settlement, these expenses would be charged to a nonoperating account. Should the case be resolved in favor of the carrier, the expenses would be amortized above the line for a "reasonable period."[48] As the discussion below demonstrates, the Commission's revised approach fails to allay the legal and policy concerns of either Court of Appeals' decision. Moreover, use of a balance sheet deferral account is practically unworkable, as the Commission itself has previously acknowledged.

1. The Commission's Proposed Treatment of Antitrust Litigation Expenses Must be Rejected Based on the Litton Court's Legal and Policy Analyses

Even assuming arguendo that the Commission's revised litigation expenses proposal does not constitute retroactive ratemaking, it must still be discarded based on the Litton Court's legal and policy analyses. While the revised proposal alters the account in which litigation expenses accrue pending

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[47] Litigation Costs Decision, 939 F.2d at 1044.

[48] Notice at ¶ 17.

the outcome of the litigation, it incorporates the very same success-failure implementing standard to trigger its accounting directive and the accompanying presumption. As the Litton Court held, however, "pertinent decisions convince us that logic and reasonableness require a wider and more discriminating focus."[49] Because the Commission's revised proposal embodies no such "wider and more discriminating focus," it must be rejected.

2. The Commission's Proposal for Deferral Account Treatment of Litigation Expenses is Unworkable as a Practical Matter

In addition, the Commission's deferral account approach is unworkable as a practical matter. The Commission itself previously rejected the use of a balance sheet deferral account for these purposes, due to "problems of both burdensome administration and inconsistency with fundamental accounting principles" inherent in this approach.[50] The Commission noted that deferred treatment would result in costs remaining in the account for extended periods of time (given the typical length and complexity of antitrust litigation) which "could create uncertainty in the financial community as to the profitability of the carrier and its ability to recover costs which may well later be shown to have been prudently incurred."[51] The Commission also concluded that a deferral approach would be inconsistent with its

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[49] Litton Accounting Appeal, 939 F.2d at 1033.

[50] Litigation Costs Order, 2 FCC Rcd. at 3247 ¶ 34.

[51] Id. at ¶ 35. See also discussion at 24-25, infra regarding the Commission's proposed interim action.

own express recognition that "the incurrence of litigation expenses is not unusual."[52]

Finally, the use of a deferral account approach would introduce additional levels of complexity into the Commission's system of accounting. At the very least, it would require the Commission to resolve certain knotty issues such as whether carriers would be allowed to earn a return on the deferred costs and what effect a deferral account approach would have on carriers' NECA pool arrangements.

In order to avoid these unintended consequences, antitrust litigation expenses should continue to be accounted for above the line. This approach is the only one consistent with: 1) both Court of Appeals' decisions; 2) the Commission's acknowledgment that the "incurrence of litigation expenses is not unusual;"[53] 3) the Commission's prior holding that the "present ratemaking treatment of litigation expenses adequately protects the public interest and that no new policy need be implemented at this time;"[54] and 4) the American concept of justice according to which parties accused of unlawful conduct have the right to

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[52] Litigation Costs Order, 2 FCC Rcd. at 3247 ¶ 35.

[53] Id.

[54] Policy Decision, 92 F.C.C.2d at 141 ¶ 2. Of course, the Commission's prior assessment of litigation expenses is correct. The defense of litigation is the normal, prudent choice for all businesses faced with potential adverse judgments. The costs are prima facie ordinary and necessary business expenses and, as such, should be presumptively allowable. It would be wholly inappropriate to provide any disincentive for a vigorous defense by creating a presumption of disallowance of any portion of litigation expenses through below-the-line accounting.

defend themselves. This right would be impaired by accounting policies which treat expenses incurred in exercising this right as presumptively illegitimate merely because the defense was "unsuccessful" as a technical legal matter and which deprives the carrier of the opportunity to recoup such expenses for what may be a significant period, even where its conduct ultimately is found to be wholly within the law.

III. OTHER TYPES OF LITIGATION

Because the use of the Commission's proposed accounting rules and ratemaking policies in the antitrust context is indefensible on legal and policy grounds, as well as unworkable as a practical matter, the Commission's proposals to extend these rules beyond the antitrust context are, a fortiori, untenable.

IV. INTERIM ACTION

The Commission's Notice requires carriers to record any antitrust judgments and settlements incurred during the interim period preceding adoption of a final order in a balance sheet deferral account.[55] COMSAT believes that the Commission is without authority to require this interim action. As the Commission correctly notes, pursuant to the vacation of the Commission's orders by the D.C. Court of Appeals' decisions, there are currently no litigation costs rules in place.

In addition, as the Commission's 1987 Litigation Costs Order recognized, deferral account treatment could create uncertainty

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[55] Notice at ¶ 30.

as to the carrier's profitability and ability to recover costs, thereby adversely affecting its standing with the financial community and impairing its ability to secure investment on favorable terms.[56] Accordingly, the Commission should not make any changes in current accounting arrangements unless and until it reaches a final decision on the basis of record evidence indicating that the proposed changes are justified.

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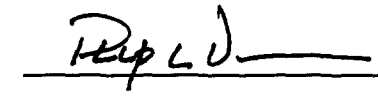
[56] See Litigation Costs Order, 2 FCC Rcd. at 3247 ¶ 35.

CONCLUSION

For the foregoing reasons, COMSAT respectfully requests that the Commission terminate the instant proceeding and continue to employ its existing ad hoc accounting and ratemaking treatment of litigation costs. Neither the Commission's Notice nor the relevant Court of Appeals' decisions supports a radical departure from this time-tested and fundamentally sound approach, which presumes good faith on the part of the carrier's management and permits the Commission to disallow presumptively reasonable expenses incurred in the company's operation only where the "challenged expense is found to be exorbitant, unnecessary, wasteful, extravagant, or incurred in the abuse of discretion or bad faith."[57]

Respectfully submitted,

COMSAT CORPORATION



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[57] Policy Decision, 92 F.C.C.2d at 144 ¶ 9.